Legal Issues in Human Resources Management

Simao J. Avila
Business Officer Institute
May 25, 2006

Overview

• Five basic steps to remember
• Evolving legal principles
• Settlements
Five Steps To Remember

- Ask basic questions
- Spot issues
- Develop the facts in context
- Call on resources
- Follow through

Ask Basic Questions

- Is this a UC employee?
- Has the matter been resolved?
- How long ago did this happen?
- Has anyone else been notified?
- Is this employee disabled?
- Does this employee qualify for leave
Ask Basic Questions

• Is there a Whistleblower/False Claims Act issue?
• Is there a Worker’s Compensation claim?
• Should we do a formal investigation?
• Is there a simple way to fix this?

Spot Issues

• Is there a possibility of workplace violence or a security issue?
  – Review security and safety procedures
  – Reiterate and reinforce policies about discrimination, harassment and retaliation
  – Review leave policies
Spot Issues

- California Legislative Activity
  - AB 429 - Workplace violence safety
  - AB 378 – Hate Crimes
  - AB 1093 – Payment of wages upon
  - AB 1825 - Sexual Harassment Training Requirement

Spot Issues

- References
  - Must you disclose information?
  - Five things to remember:
    - T is for Truth
    - E is for Evidence
    - R is for Respond to a request
    - M is for Malice: not allowed
    - S is for Scope
Spot Issues

• References
  – Noel v. River Hills Wilsons, Inc. (2003). 113 Cal. App. 4th 1363 Incorrect information given in a reference check is not actionable where the mistake was inadvertent error and there was no evidence of malice

Spot Issues

• Disability rights laws
  – Federal Americans with Disabilities Act (ADA)
  – Cal. Fair Employment and Housing Act (FEHA)
  – Worker’s Compensation
  – Privacy Interest
Spot Issues

• Disability rights laws
  – General principle: Employer may not discriminate against a qualified individual with a physical or mental disability
  – AB 2222 dramatically changed FEHA to liberalize the standards for disability rights under state law.

Spot Issues

• Disability rights laws
  – Mental/physical disability need only “limit” a major life activity, not “substantially limit.”
  – Major life activities include working, (including a “particular employment”), studying and even social activities
Spot Issues

• Disability rights laws
  – California legislature intended to eliminate the duration element to qualify a condition as a disability under AB 2222.

• Disability rights laws
  – Pre-placement medical exams
  – Fitness for duty
Spot Issues

• Disability rights laws
  – Is individual disabled?
  – Is she qualified to perform essential functions of the job?
  – Did she request an accommodation or do we know that one is needed?

• Interactive Process:
  – direct communication with employee (representative) to explore possible accommodations,
  – consideration of any accommodation requested by the employee,
  – offer of a reasonable and effective accommodation, if one exists, without causing the employer undue hardship.
Spot Issues

• Interactive Process:
  – Identify barriers to equal opportunity, identifying and distinguishing between essential and nonessential job tasks.
  – Assess the reasonableness of each in terms of effectiveness and equal opportunity.

• Interactive Process:
  – Implement the accommodation that is most appropriate for the employee and the employer under all the circumstances. The decision is the Employer’s ultimately.
Spot Issues

• Interactive Process:
  – The accommodation must work effectively. If not, try again. The process goes on until the employee no longer needs accommodation or the employee refuses to participate in the process in good faith or we determine there is no reasonable accommodation.

  Humphrey v. Memorial Hospitals
  (9th Cir. 2001) 39 F.3d 1128.

• Interactive Process:
  – Reassignment to a vacant position” is considered a reasonable accommodation. The employer must make an active effort, not just give the employee a list of vacant positions and tell the employee to apply.
Spot Issues

• Interactive Process:
  – An employer’s good faith consideration of an employee’s requested accommodation requires more than an uninformed rejection. The employer may not merely speculate that the employee’s suggested accommodation is not feasible, but must gather sufficient information from qualified experts to determine the accommodation’s effectiveness.


• Interactive Process:
  – Leaves of absence may be a reasonable accommodation.
  – Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA): Threshold issues and notice - 1250 hours for eligibility.
Spot Issues
Responsibilities: WC v. FEHA

• Evaluation temporary restrictions to determine appropriate TWA.
• Evaluate permanent conditions to determine appropriate modified or alternative work.
• Evaluate physical or mental functional limitations vis a vis essential functions
• Suggest reasonable accommodations
• Monitor effectiveness of accommodations

Spot Issues

• Harassment, Discrimination and Retaliation
  – race, color, national origin, ancestry, sex, sexual orientation, physical and mental disability, age (over 40), gender identity and religious creed.
Spot Issues

- Harassment, Discrimination and Retaliation
  - Under FEHA, the University is strictly liable for unlawful harassment by supervisors
  - No defense to liability
  - Possible defense to damages only under doctrine of “avoidable consequences.”
    State Dept. of Health Services v. Superior Court

Spot Issues

- Harassment, Discrimination and Retaliation
  - Same sex harassment is covered by Title VII
    Oncale v. Sundowner Offshore Servs.
    (1998) 523 U.S. 75
  - It is actionable under California law as well
Spot Issues

• Harassment, Discrimination and Retaliation
  Paramour favoritism can be the basis for a hostile environment claim even if the non-paramour employee is not subjected to sexual advances herself.

  Miller v. Dept. of Corrections

Spot Issues

• Harassment, Discrimination and Retaliation
  Abusive, bullying conduct need not be of a sexual nature or intentionally targeted at women to be unlawful harassment under Title VII; does it adversely affect women more than men?

  422 F.3d 840 (9th Cir. 2005).
Spot Issues

• Harassment, Discrimination and Retaliation
  Retaliation is unacceptable under the law as well: - Employee who resisted what she believed to be an order with a discriminatory intent was protected against retaliation even though she did not file a complaint.
  Yanowitz v. L’Oreal

Spot Issues

• HEERA
• CBA applicable to the unit employees
• Unfair labor practices
• Status Quo
• Strikes (Protected conduct)
• Fair Labor Standards Act
Develop the Facts in Context

- Investigate
- Longevity is important!
- Look at the complete picture
- Analyze operational impact on your unit

Resources

- HR
- Risk Management/EHS
- Internal Audit
- AA/EEO Office – Title IX Officers
- Employee Relations
- Labor Relations
- OGC
Follow Through

• Inaction is a decision!
  – Candidly evaluate performance annually
  – Use progressive discipline

Settlements and Post-Mortems

• Why settle cases?
  – Are you right? Can you win? How will it play in Peoria?
  – In context, is the case worth the cost of litigation?
  – New Regents’ policy